## TABLE OF CONTENTS


Preliminary Statement ..... 1
Jurisdiction ..... 12
Question Presented ..... 14
Argument ..... 15
Reasons for Denying Petition ..... 23
Conclusion ..... 24
Certificate of Service ..... 25


### Table of Authorities

CASES


*American Railway Express Co.* v. *Kentucky*, 273 U.S. 269 (1926) ..... 18
*Ashe* v. *Swenson*, 397 U.S. 436 (1954) ..... 19
*Atlantic Coast Line R. Co.* v. *Barrett*, Fla. 1958, 101 So. 2d 37 ..... 20
*Atlantic Coast Line R. Co.* v. *Price*, Fla. 1950, 46 So. 2d 48 ..... 5
*Atlantic Coast Line R. Co.* v. *Wallace*, 61 Fla. 93, 54 So. 893 ..... 5
*Atlantic Coast Line R. Co.* v. *Webb*, 112 Fla. 449, 150 So. 741 ..... 5
*Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316 (1927) ..... 6, 17
*Boatel, Inc.* v. *Delamore*, 5 Cir. 1967, 379 F. 2d 850 ..... 22
*Bretsky* v. *Lehigh Valley R. Co.*, 2 Cir. 1946, 156 F. 2d 594 ..... 22
*Caudell* v. *Florida East Coast R. Co.*, Fla. App. 1966, 201 So. 2d 583 ..... 6

*Chicago, R.I. & P.R. Co.* v. *Schendel*, 270 U.S. 611 (1926) ..... 11, 17, 18, 22
*City of Miami* v. *Jafra Steel Corp.*, Fla. 1966, 184 So. 2d 178 ..... 13
*Crane* v. *Cedar Rapids & I. C. R. Co.*, 395 U.S. 164 (1969) ..... 6
*Dresner* v. *Tallahassee*, 378 U.S. 539 (1964) ..... 14
*Fidelity-Philadelphia Trust Co.* v. *Ball*, Fla. App. 1968, 208 So. 2d 282 ..... 23
*Fisher* v. *Perkins*, 122 U.S. 522 (1887) ..... 14
*Florida East Coast R. Co.* v. *Edwards*, Fla. 1967, 197 So. 2d 293 ..... 5
*Foley* v. *Weaver Drugs, Inc.*, Fla. 1964, 177 So. 2d 221 13
*Gahagen Construction Corp.* v. *Armao*, 1 Cir. 1948, 165 F. 2d 301 ..... 23
*General Dynamics Corp.* v. *Hewitt*, Fla. App. 1969, 225 So. 2d 561 ..... 23
*Georgia S. & F. R. Co.* v. *Seven-Up Bottling Co.*, Fla. 1965, 175 So. 2d 39 ..... 5
*Gordon* v. *Gordon*, Fla. 1952, 59 So. 2d 40 ..... 16, 19
*Gotthilf* v. *Sills*, 375 U.S. 79 (1963) ..... 14
*Hodge* v. *Jacksonville Terminal Co.*, Fla. App. 1965, 170 So. 2d 481, cert. den., Fla. 1965, 177 So. 2d 475 .... 4, 6
*Hodge* v. *Jacksonville Terminal Co.*, Fla. App. 1969, 222 So. 2d 483, cert. granted and decision quashed in part, Fla. 1970, 234 So. 2d 645, cert. den., 400 U.S. 904 (1970) ..... 2, 6, 8
*Hogan* v. *C. & H.R. Co.*, 2 Cir. 1915, 223 F. 890 ..... 22
*Jacksonville Terminal Co.* v. *Hodge*, Fla. App. 1972, 260 So. 2d 521 ..... 1, 4, 9
*Maxwell* v. *Kurn*, Mo. App. 1944, 180 S.W. 2d 249, reversed on other grounds, Mo. 1944, 185 S.W. 2d 9 .... 22

*McCalley* v. *Seaboard Coast Line R. Co.*, Fla. 1972, 265 So. 2d 11 ..... 20
*Mellon* v. *O'Neil*, 275 U.S. 212 (1927) ..... 13
*Mike Hooks, Inc.* v. *Pena*, 5 Cir. 1963, 313 F. 2d 696 ..... 23
*Mondou* v. *New York, N.H. & H. R. Co.*, 223 U.S. 1 (1908) ..... 2, 21
*Muller* v. *Western Union Beef Co.*, 173 U.S. 116 (1899) 14
*Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967) ..... 13
*New York Central R. Co.* v. *Winfield*, 244 U.S. 147 (1917) ..... 2, 21
*Osborne* v. *Van Horn*, 1848, 2 Fla. 360 ..... 13
*Parsons* v. *Reyes*, Fla. 1970, 238 So. 2d 561 ..... 12
*Price* v. *Florida East Coast R. Co.*, Fla. App. 1966, 186 So. 2d 261 ..... 13
*Pritt* v. *West Virginia N. R. Co.*, 132 W. Va. 184, 51 S.E. 2d 105, cert. den., 336 U.S. 961 (1943) ..... 22
*Roberts* v. *Powell*, 137 Fla. 159, 187 So. 766 ..... 5
*Schumacker* v. *Industrial Accident Commission*, 46 Cal. App. 295, 115 P. 2d 571 ..... 22
*Seaboard Airline R. Co.* v. *Branham*, Fla. 1958, 104 So. 2d 356 ..... 13
*Stratton* v. *Stratton*, 239 U.S. 55 (1915) ..... 14
*Street* v. *New York*, 394 U.S. 576 (1969) ..... 7, 9, 15
*Troxell* v. *Delaware L. & W. R. Co.*, 227 U.S. 434 (1913) ..... 11, 16, 18
*Tyus* v. *Apalachicola Northern R. Co.*, Fla. 1961, 130 So. 2d 580 ..... 12
*United States* v. *International Building Co.*, 345 U.S. 502 (1953) ..... 19
*Waters* v. *Guile*, 6 Cir. 1916, 234 F. 532 ..... 22

*Wilkes* v. *Mississippi River Sand & Gravel Co.*, 6 Cir. 1953, 202 F. 2d 383 ..... 23
*Williams* v. *Florida*, 399 U.S. 78 (1970) ..... 13
*Woodington* v. *Pennsylvania R. Co.*, 2 Cir. 1956, 236 F. 2d 760 ..... 5

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES

Art. V., § 4(2), Florida Constitution ..... 1, 8, 12
F.S. § 768.01 ..... 4, 10
F.S. § 768.05 ..... 5
F.S. § 768.06 ..... 5
Florida Appellate Rule 4.5c(6) ..... 12
Florida Rule of Civil Procedure 1.110(g) ..... 23
28 U.S.C., § 1257 ..... 12, 23
28 U.S.C., § 1257(3) ..... 1, 12
45 U.S.C., § 9 ..... 2
45 U.S.C., § 51 ..... 2, 16
45 U.S.C., § 53 ..... 2, 6
45 U.S.C., § 54 ..... 10
45 U.S.C., § 688 ..... 21
45 U.S.C.A., § 51 ..... 1, 3

TEXT

Restatement, Judgments, § 1 ..... 21

# In the Supreme Court of the United States

OCTOBER TERM, 1972

**No. 72-173**

JACKSONVILLE TERMINAL COMPANY,
a Corporation,
*Petitioner,*

vs.

IRIS HODGE, As Administratrix of the Estate of
James L. Hodge, Deceased,
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### PRELIMINARY STATEMENT

The petitioner, Jacksonville Terminal Company, seeks review by petition for writ of certiorari, pursuant to 28 U.S.C., § 1257(3) of the decision of the First District Court of Appeal of Florida in *Jacksonville Terminal Co. v. Hodge*, Fla. App. 1972, 260 So. 2d 521. The decision, in which no certiorari review was sought to the Florida Supreme Court as permitted by Art. V, § 4(2), Florida Constitution, affirmed a jury verdict and judgment recovered by the plaintiff, the representative of the estate of James L. Hodge, deceased, in a wrongful death action under the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., § 51. The action was based upon alternative con-

tentions that Hodge's death had been caused, in whole or in part, by his employer, the terminal company's negligence, under 45 U.S.C., § 51; and by its violation of the "train brake" provision of the Safety Appliance Act, 45 U.S.C., § 9.[1] Among other things, the decision sought to be reviewed

(a) Affirmed a determination by the trial judge that, as a matter of law, Hodge had been killed while in the course of his employment with the defendant railroad, and thus that an action for his wrongful death could be maintained only under the F.E.L.A., see *Mondou* v. *New York, N.H. & H. R. Co.*, 223 U.S. 1 (1908); *New York Central R. Co.* v. *Winfield*, 244 U.S. 147 (1917); and

(b) That the F.E.L.A. action for the benefit of Hodge's widow and his three minor children was not precluded by the fact that Mrs. Hodge, acting individually and as widow for her own benefit alone, had maintained and lost an action assumedly under the Florida wrongful death statute for the death of her husband allegedly "proximately" caused by common law negligence of the railroad—an action in which the Safety Appliance Act question was not at all involved and in which the status of Hodge as an employee at the time of the accident and thus the applicability of the F.E.L.A. as the exclusive remedy for his death had never been raised by either party or adjudicated in any way.

---

1. In prior decisions involving this case, the Florida Appellate Courts have upheld the sufficiency of the evidence to support the jury instruction, and thus a jury finding of liability against the railroad—without deduction for contributory negligence, 45 U.S.C., § 53—on the Safety Appliance Act issue. *Hodge* v. *Jacksonville Terminal Co.*, Fla. App. 1969, 222 So. 2d 483, cert. granted and decision quashed in part, Fla. 1970, 234 So. 2d 645, cert. den., 400 U.S. 904 (1970).

In this proceeding, the railroad-petitioner does not challenge the former ruling; it seeks certiorari solely on the basis of the latter one.

The case arose on the Sunday evening of September 30, 1962, when James L. "Bill" Hodge, a switchman-conductor employed by the Jacksonville Terminal Company, was killed at his employer's Church Street grade crossing in Jacksonville, Florida. Shortly before the accident occurred, Hodge had changed into his working clothes and picked up his switchman's lantern at the locker room provided by the terminal company for its employees on the west side of the 13-track crossing. Hodge was driving his car east on Church Street to begin his work at the "express shed" or yard office which was located to the east of the tracks adjacent to a parking lot provided for the use of those employees who work there. Unfortunately Hodge did not make it across the tracks. His automobile was struck by a "cut" of seven cars and three diesel engines being backed in a northerly direction by a Jacksonville Terminal Company crew and he was, apparently instantly, killed.

Affirmatively alleging that at the time of his death Hodge had been employed by Jacksonville Terminal in furtherance of interstate commerce so as to invoke the application of the Federal Employer's Liability Act, 45 U.S.C.A., § 51, his widow, Iris Hodge, as the duly appointed Administratrix of his estate, brought this two-count action in the Duval County, Florida Circuit Court against the terminal company to recover the damages provided by the F.E.L.A. for the benefit of herself as widow and of Hodge's three minor children, Richard, James and Jill, who were nine, five and three years of age respectively at the time of his death. The railroad's answer claimed that Hodge was not acting within the course of his employment with the railroad at the time of his death; and,

apparently alternatively, that the F.E.L.A.-Safety Appliance Act action was barred by the doctrines of "res judicata," and/or "estoppel by judgment" or "collateral estoppel" by virtue of the jury verdict and judgment in favor of the railroad in an action arising out of Hodge's death, which were affirmed in *Hodge* v. *Jacksonville Terminal Co.*, Fla. App. 1965, 170 So. 2d 481, cert. den., Fla. 1965, 177 So. 2d 475. That case had been mistakenly brought, and was mistakenly maintained throughout without comment or contention by either party or adjudication by any court on the issue, as if it were one under the Florida wrongful death statute and the Florida common law for the death of an "ordinary" motorist in an "ordinary" railroad crossing accident. In that case, as provided by the Florida wrongful death statute, F.S. § 768.01, et seq., Mrs. Hodge sued individually to recover damages in her own behalf and in her own right as Hodge's widow. While, under the Act, such a widow may recover, as an element of the damages to which she is individually entitled, for the loss of her husband's services to and support of their minor children, any recovery—as the court below specifically held in its decision in this case, at 260 So. 2d 523—inures solely to her benefit, and she need not share any recovery, including one for this element of damage, with the children. In contrast, of course, an F.E.L.A. action—such as this one—is maintained specifically for the use and benefit of the children themselves (as well as the widow) and their individual recovery inure directly to their individual benefits. The earlier common law action by Mrs. Hodge did not involve at all a contention that the railroad had been guilty of a Safety Appliance Act violation; the prior trial did not concern the issue, and the prior judgment, of course, did not reflect any determination of it. On the common law negligence question, which was the sole issue tried in the "first" case, Mrs. Hodge

(a) Was required to show that the railroad had been guilty of negligence, defined in common law terms, which was a "proximate cause" of the accident, see *Atlantic Coast Line R. Co.* v. *Price*, Fla. 1950, 46 So. 2d 48;[2]

(b) Was bound by civil Florida common law rules that grant railroad trains a preemptive "right-of-way" over travelers at the crossing, *Roberts* v. *Powell*, 137 Fla. 159, 187 So. 766;

(c) Could not base a claim of negligence upon the railroad's failure to provide a particular protective device at the crossing in question, beyond the "crossbuck" statutorily required. See *Atlantic Coast Line R. Co.* v. *Wallace*, 61 Fla. 93, 54 So. 893. Thus, she could not assert that the railroad had been guilty of negligence in not providing a crossing gate at Church Street, although such a device was required in the exercise of reasonable care. Contrast, e.g., *Woodington* v. *Pennsylvania R. Co.*, 2 Cir. 1956, 236 F. 2d 760, 764-765;

(d) Was thus confined to an attempt to demonstrate that the railroad had been guilty of negligence in excessive speed or failure to give adequate warning signals from the train as it approached the cross-

2. The railroad "presumption" statute, F.S. § 768.05, to which the petitioner refers (and which, along with the comparative negligence statute, F.S. § 768.06, has since been held unconstitutional by the Florida Supreme Court, *Florida East Coast R. Co.* v. *Edwards*, Fla. 1967, 197 So. 2d 293; *Georgia S. & F. R. Co.* v. *Seven-Up Bottling Co.*, Fla. 1965, 175 So. 2d 39) was of purely procedural significance. The "presumption" dropped out of the case upon the introduction of any evidence on the subject of negligence and had no practical effect whatever upon the trial of a Florida common law railroad case or the substantive burdens borne by the plaintiff in such an action. See *Atlantic Coast Line R. Co.* v. *Webb*, 112 Fla. 449, 150 So. 741.

ing. As to the latter issue, as the first appellate decision reflects, *Hodge* v. *Jacksonville Terminal Co.*, at 170 So. 2d 483-484, the plaintiff was bound by a severely restrictive state evidentiary rule and jury instruction to the effect that "negative" testimony that such signals were not given could not overcome "positive" testimony from the train crew that they were.

Thus, the prior jury verdict against Mrs. Hodge, individually, on the one hand, see *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 323 (1927), was based upon an action which severely confined the possible bases of recovery, as contrasted with those of the F.E.L.A.-S.A.A.; and, on the other hand, for "collateral estoppel" purposes did not represent an adjudication of any of the factual bases of the estate's recovery against the railroad in the latter action—the Safety Appliance Act violation, and the alternative contention that the railroad, in a variety of respects, had been guilty of negligence under the F.E.L.A., which played a part, "even the slightest," in causing, in whole or in part, Hodge's death.[3]

---

3. The Florida state remedy vastly differed from that afforded by the F.E.L.A. for still another, decisive reason. Although the plaintiff would have been *able* to claim a Safety Appliance Act violation in the Florida wrongful death action, see *Caudell* v. *Florida East Coast R. Co.*, Fla. App. 1966, 201 So. 2d 583, that action would have been subject to the then-applicable state defense of "comparative negligence" on the part of Hodge, *Crane* v. *Cedar Rapids & I. C. R. Co.*, 395 U.S. 164 (1969); under the F.E.L.A., of course, as held in this case, neither comparative nor contributory negligence constitutes any defense whatever, 45 U.S.C., § 53. Moreover, a comparison of the facts and holding in *Caudell*, supra, involving a Florida "common law" Safety Appliance Act action with those in the prior decision in this case, *Hodge* v. *Jacksonville Terminal Co.*, Fla. App. 1969, 222 So. 2d 483, demonstrates that, if Florida rather than F.E.L.A. law were involved, the Florida courts might well have held that the evidence was insufficient in this case to make out a jury question on the Safety Appliance Act issue.

The trial judge consistently rejected the railroad's defenses involving the prior action. At the trial, he determined, as we have noted, that the F.E.L.A. properly applied to Hodge's death as a matter of law, and did not submit that issue to the jury. As to liability, he submitted both the negligence-comparative negligence issue involved in Count I,[4] and the "brake efficiency" issue involved in Count II to the jury. The railroad objected to the use of special interrogatories proposed by the plaintiff which would have determined the count upon which the jury reached its eventual verdict for the plaintiff. Because of this objection, the verdict returned by the jury was a *general* one in favor of the plaintiff which awarded a total of $195,200 to Mr. Hodge's estate, with allocations of $133,200 for the benefit of Mrs. Hodge, $16,000 to the older son, Ricky, $21,000 to the younger son and $25,000 to Jill.[5] [6]

---

4. These claims involved, among other things, the contentions that the railroad was negligent in failing to provide an automatic crossing gate; and that it had not given proper whistle or bell warning of the train's approach.

5. In its appeal to the First District Court of Appeal, the railroad, at page 47 of its brief, claimed that this amount included no deduction whatever for any negligence of Mr. Hodge which was said to have existed in at least some amount as a matter of law. At page 7, n. 6 of the brief of appellee, the plaintiff accepted this contention, which amounted to the conclusion that the verdict was necessarily based upon the Safety Appliance Act violation as to which there is no deduction for contributory negligence—regardless of its existence. Hence, the posture of the case in the Court of Appeal was that the sole basis of the jury verdict was the Safety Appliance Act violation, as to which there was no issue made whatever in the "first" case.

6. At page 12 of the petition, the railroad makes some claim that, even if the children are entitled to their verdicts and are not barred by a prior proceeding in which they were not parties in any respect, Mrs. Hodge may not recover the amount allocated to her. This claim may not, it is submitted, even be considered by this Court since it comes for the first time in this proceeding; the railroad throughout its pleadings and appellate briefs, claims only that the entire action was barred by the first case and that it was entitled to a judgment in its favor in the entire action. See *Street* v. *New York*, 394 U.S. 576, 581-582 (1969).

After the return of the verdict the railroad filed motions for judgment in its favor notwithstanding the verdict and for a new trial, based upon numerous grounds. The trial judge denied the motion for judgment, but granted the motion for new trial upon the single ground that he had improperly instructed the jury on the Safety Appliance Act issue, since, his order stated, "there is no evidence upon which the jury could have properly found that defendant violated [the statute] . . ." The plaintiff then appealed to the First District Court of Appeal from that order. In *Hodge* v. *Jacksonville Terminal Co.*, Fla. App. 1969, 222 So. 2d 483, the District Court rejected the conclusion that the evidence did not sustain an instruction under the S.A.A. but affirmed the order granting a new trial upon another ground. As provided by Art. V, § 4(2), Florida Constitution, the plaintiff then applied to the Supreme Court of Florida for a writ of certiorari to review the latter conclusion, on the ground that the District Court also was in "direct conflict with a decision of another District Court of Appeal [and] of the Supreme Court on the same point of law. . ." The Supreme Court of Florida granted the petition, and on the merits, quashed the affirmance of the new trial order in *Hodge* v. *Jacksonville Terminal Co.*, Fla. 1970, 234 So. 2d 645, cert. den., 400 U.S. 904 (1970). When, pursuant to the Supreme Court of Florida order, the trial judge reinstated the prior judgment for the plaintiff, the petitioner then took the appeal which is the subject of this proceeding, again to the First District Court of Appeal.[7] The petitioner raised five separate points in the

7. Under Florida appellate practice involving appeals from orders granting new trials, the only matters reviewable on the merits in the prior appeal concerned the grounds specified for the granting of the new trial motion. It was not until the remand and the reinstatement of the judgment for the plaintiff that the railroad could raise its multiplicity of appellate objections as to the rulings *against* it.

District Court of Appeal upon which it based its claims for a judgment in its favor or for a new trial. The points are stated at 260 So. 2d 522:

1. The railroad primarily claimed that the effect of Mrs. Hodge's having *brought* the first action barred the estate's right to any recovery in this one. In presenting its argument on this issue, the brief of appellant in the District Court

(a) Specifically conceded that one of the doctrines now relied upon—res judicata—was inapplicable;

(b) Referred only fleetingly to the other doctrine referred to here—collateral estoppel—and

(c) Relied entirely as "determinative," upon a contention which is not made before this Court at all. At pages 14-16 of the brief of appellant, the railroad made the following statements:

"*By applying the above principles we readily conclude that the defense of res adjudicata* (*defendant's sixth defense*) *is not here sufficient* because the first and second Hodge cases each involve different causes of action:[8] The first suit was brought under the Florida wrongful death statute; the second, under FELA. Although many of the elements of Estoppel by Judgment (defendant's fifth defense) are present, this defense presents

8. Although, as the opinion below at 260 So. 2d 523, n. 7, reflects, the railroad attempted to change its position initially in its reply brief, the District Court held that this could not be done and, for obvious valid state procedural reasons, did not pass upon the belatedly asserted claim of res judicata at all. Since this is the case, as we shall emphasize, it is plain that the "merits" of the res judicata claim cannot be properly presented for the first time to this Court. See *Street* v. *New York*, supra.

> some difficulty in that it impliedly recognizes the co-existence of two valid causes of action. As previously noted, this is not the situation in the instant case. The plaintiff here had only one cause of action (FELA or F.S. 768.01) depending upon the 'employment status' of her husband at the time of his death. This leads us to the defendant's third defense which, defendant submits, is determinative of the issues of this cause. This defense is a 'form' of estoppel by judgment. Its essence is that the plaintiff, having assumed and prosecuted to ultimate conclusion the first cause of action under F.S. 768.01 upon the necessary factual premise that her husband at the time of his death was not employed by defendant in furtherance of interstate commerce, is now estopped to assert a different and inconsistent state of facts in order to create a new cause of action under FELA, arising out of the same accident."

2. The railroad also contended that the trial judge's determination that the F.E.L.A. applied as a matter of law was incorrect; and that he had erred in charging the jury that the doctrine of assumption of the risk did not apply to the action. 45 U.S.C., § 54.

In the decision now sought to be reviewed, the District Court of Appeal reviewed each of the defendant's contentions. It held:

> That the doctrine of "collateral estoppel"—the only defense it discussed on the point—[9] did not apply to preclude the estate's recovery under the F.E.L.A.-S.A.A. As to *this issue* it rested its decision upon

---

9. Ibid.

the fact that the "parties" in the two cases were not the same; that is that "Florida law makes a substantive distinction. . ." between the widow's right to recovery under the Florida wrongful death act, in which the recovery "inures solely to the benefit of the widow" and an administrator's action under the F.E.L.A. in which "the estate must maintain the action for the use and benefit of the widow and the minor children. . ." Under these circumstances, the Court held that the decision of this Court in *Troxell* v. *Delaware L. & W. R. Co.*, 227 U.S. 434 (1913), in which the same situation was involved, applied; and that the later decision in *Chicago R. I. & P.R. Co.* v. *Schendel*, 270 U.S. 611 (1926), in which the sole beneficiary of the F.E.L.A. administrator's action was the widow who had been a party to an earlier proceeding, and in which there were no children or other beneficiaries involved, did not apply. The District Court did not discuss any of the numerous other reasons for the inapplicability of the collateral estoppel doctrine to the facts of this situation.

The District Court also upheld the determination as to the applicability of the federal remedy as a matter of law; and rejected the claim that the "no assumption of risk charge" had been error. The other contentions of the railroad as to evidentiary error and "gross excessiveness" were likewise held to have been without merit.

Although the defendant petitioned for rehearing in the District Court of Appeal, it did not, upon the denial of that petition, petition the Supreme Court of Florida for a writ of certiorari to review the merits of the District Court decision. Instead, it directly filed this petition for writ of certiorari in this Court.

## JURISDICTION

The petitioner invokes this Court's jurisdiction to review the First District Court of Appeal decision below on the basis, of course, of 28 U.S.C., § 1257(3). It is clear, however, that the petitioner, because of its failure to seek certiorari review in the Supreme Court of Florida, cannot, as is required, affirmatively show that the District Court decision is one rendered by the "highest court of a State in which a decision could be had. . ."; therefore, it is submitted, that this Court lacks jurisdiction to review the decision below under 28 U.S.C., § 1257.

As we have indicated, under Art. V, § 4(2) of the Florida Constitution—the provision which the respondent successfully invoked in the prior appellate proceedings—the Supreme Court of Florida may review on petition for writ of certiorari any decision of the District Court of Appeal, such as the one below—which it determines to be in "direct conflict" with a prior decision either of another District Court of Appeal or of the Supreme Court itself. E.g., *Parsons* v. *Reyes*, Fla. 1970, 238 So. 2d 561. Furthermore, when the jurisdiction of the Supreme Court of Florida is properly invoked because of the existence of a "direct conflict" with a prior decision on *any issue*, the Supreme Court of Florida has jurisdiction to decide every issue raised in the action, as if the case were on direct appeal to the Supreme Court. E.g., *Tyus* v. *Apalachicola Northern R. Co.*, Fla. 1961, 130 So. 2d 580, 585-586. Of course, the existence of such a constitutional "direct conflict" is itself the subject of argument—in the preliminary briefs on jurisdiction provided by Florida Appellate Rule 4.5c(6)—and de-

cision by the Florida Supreme Court.[10] But the fact is that, unlike virtually every Florida litigant who has filed a petition for certiorari directed to a District Court of Appeal, the petitioner in this case cannot show that the Supreme Court of Florida did not have jurisdiction in the case, because it failed to ask that Court to review it.[11] Compare, e.g., *Mellon* v. *O'Neil*, 275 U.S. 212 (1927).

---

10. The respondent can suggest at least two non-frivolous bases for a claim of constitutional "direct conflict" which the petitioner could have made, but, of course, did not, in an attempt to secure Supreme Court of Florida review of the decision it now questions here:

(a) At page 13 of the petition here, the railroad itself indicates that the District Court determination of a substantive difference between a widow's recovery under the Florida wrongful death statute and the estate's claim under the F.E.L.A. is somehow contrary to the "well established law in Florida" based upon the decision of the Supreme Court of Florida in *Osborne* v. *Van Horn*, 1848, 2 Fla. 360, to the effect that a widow may "resort to the awards to the children in order to support them." If the Supreme Court of Florida agreed, it had jurisdiction to resolve the disparity in decisions. *City of Miami* v. *Jafra Steel Corp.*, Fla. 1966, 184 So. 2d 178.

(b) Throughout the appellate proceedings below, the railroad contended that the granting of the no "assumption of the risk" charge was erroneous and directly contrary to the holding of the *Third* District Court of Appeal in the F.E.L.A. case of *Price* v. *Florida East Coast R. Co.*, Fla. App. 1966, 186 So. 2d 261, where it said at 263, that ". . . it would have been improper for the Court to have injected, by instruction, the specter of assumption of the risk." Again, the petitioner might well have argued that the First District's affirmance of the trial judge's action in granting just such an instruction was in "direct conflict" with the *Price* case. Of course, it did not.

11. Thus, the case is totally unlike *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), in which this Court stated at 389 U.S. 237, n. 1, that a per curiam denial of certiorari by the District Court of Appeal "apparently precludes further state review" on the ground that the Florida Supreme Court "seems to have decided that it lacks jurisdiction by appeal to consider per curiam denials of certiorari. . ." (But see *Foley* v. *Weaver Drugs, Inc.*, Fla. 1964, 177 So. 2d 221.) In the present situation, of a written opinion by the District Court of Appeal in a direct appeal, there is no question of the discretionary power of review granted to the Supreme Court of Florida when a conflict of decisions appears. See *Seaboard Airline R. Co.* v. *Branham*, Fla. 1958, 104 So. 2d 356; compare also, *Williams* v. *Florida*, 399 U.S. 78, 80, n. 5 (1970).

Under these circumstances, in which the petitioner has failed to seek possibly available review by a higher state court, this Court cannot "indulge in conjecture" as to whether the Florida Supreme Court would or would not have assumed jurisdiction over the case and passed upon its merits, see *Fisher* v. *Perkins*, 122 U.S. 522 (1887); *Stratton* v. *Stratton*, 239 U.S. 55 (1915); *Gotthilf* v. *Sills*, 375 U.S. 79 (1963). It follows that the petition does not affirmatively demonstrate, see *Fisher* v. *Perkins*, supra; *Muller* v. *Western Union Beef Co.*, 173 U.S. 116 (1899), that the District Court of Appeal is the highest court in Florida which could have decided the case in question, and the petition should be denied for that reason alone. *Dresner* v. *Tallahassee*, 378 U.S. 539 (1964).

## QUESTION PRESENTED

The railroad has presented one "question" for review by this Court. In view of what the respondent has already said concerning the procedural, legal and factual bases of the case, it is obvious that it cannot accept the petitioner's statement of that question. It is believed that it may properly be rephrased as follows:

> Whether an action for the death of a railroad employee killed in the course of his employment, and properly maintained under the F.E.L.A. and Safety Appliance Act by his estate for the benefit of his widow and three minor children is precluded, as a matter of law, under the doctrine of collateral estoppel, by the fact that the employee's widow had erroneously and unsuccessfully maintained an action under a state wrongful death statute—which was jurisdictionally inapplicable to the case—solely for

her own use and benefit, and in which the liability issues upon which the estate recovered were decisively different, and in the case of the safety appliance act contention, not involved at all.

## ARGUMENT

The respondent estate contends that the question presented does not justify certiorari review, on the merits, by this Court. This is so essentially because, on the virtually unique procedural and factual situation which was presented here, the result reached by the District Court—which was in essence that a jurisdictionally exclusive federal remedy could not be denied because of a mistaken and unsuccessful attempt by a railroad employee's widow to recover under inapplicable state statutory and substantive common law—for several separate reasons, was both correct, and in full accordance with the applicable decisions of this Court.

While the petitioner blithely and interchangeably argues the doctrines of "res judicata" and "collateral estoppel," it is clear that, having expressly abandoned the "res judicata" argument in the District Court of Appeal—a concession which directly resulted in the state court's failure to pass upon the sufficiency of that defense, cf., *Street* v. *New York*, supra, at 394 U.S. 582 and cases cited, because of its "want of proper presentation" there—this issue likewise may not be properly considered by this Court. Concerning the point upon which the District Court did rule and which is pressed here, "collateral estoppel," it is equally clear that the decision was, for several reasons, entirely correct:

1. It is, of course, a prerequisite for the application of the doctrine of "collateral estoppel" (as well as that of "res judicata") that the parties in the two successive actions be identical. E.g., *Troxell* v. *Delaware L. & W. R. Co.*, supra; *Gordon* v. *Gordon*, Fla. 1952, 59 So. 2d 40. Clearly, adjudications against party A cannot estop party B from securing a purportedly contrary factual determination. This rule, as the District Court properly held below, is directly applicable here. For the District Court established that, as a matter of Florida law, Mrs. Hodge, acting individually for her own benefit under the Florida wrongful death statute, is not the same "party" as Mrs. Hodge acting as the duly appointed representative of the estate of her husband for the use and benefit not only of herself, but of her three minor children as required under the F.E.L.A., 45 U.S.C., § 51.

The non-identity of the parties plaintiff involved in the two cases was established by this Court in the *Troxell* case, supra, which is virtually on all fours with this one and which—contrary to the petitioner's contentions—has specifically not been receded from in any subsequent case. In that case, as in this one, a railroad employee's widow—and in contrast to this case, joining her three children as parties plaintiff—first sued the railroad for his wrongful death purportedly under the law of Pennsylvania. After ultimately proving unsuccessful, she sought to maintain a wrongful death action as administratrix under the F.E.L.A. This Court rejected the contention that she was estopped by the prior action to do so—both holdings are applicable here:

"(a) This Court first held that the doctrine of "res judicata" could not apply because the successive

causes of action sued upon were not identical, 227 U.S. at 440-444; *this holding* was interpreted in *Baltimore S.S. Co.* v. *Phillips, supra*, as resting on the fact that the state-law remedy was markedly more restrictive than that provided under the F.E.L.A. because of the fact that an employee could not recover for the negligence of a fellow servant.

(b) The Court, in an alternative holding also held that the "parties" in the two cases were not the same. At 227 U.S. 444, the Court stated that

> ". . . there was not that identity of parties in the former action by the widow and the present case, properly brought by the administrator under the employers' liability act, which renders the former suit and judgment a bar to the present action."

In the subsequent case of *Chicago R.I. & P.R. Co.* v. *Schendel*, upon which the petitioner so heavily relies, this Court treated this second "non-identity of parties" determination in the *Troxell* case. In *Schendel*, in contrast to *Troxell* and this case, the sole "use beneficiary" of the F.E.L.A. wrongful death action was the widow herself, rather than the widow and minor children as well.[12] Under those facts, this

---

12. Also in direct contrast to this case, the plaintiff widow in the prior workmen's compensation proceeding involved in the *Schendel* case had sustained a specific adverse adjudication that the state statute, rather than the F.E.L.A., applied as a factual matter to the circumstances of her husband's death. In that context alone, this Court held she was bound under collateral estoppel principles by that express adjudication. As we shall note, the law applicable to a situation like the present one, in which there has been no prior jurisdictional adjudication whatever, is entirely different and is to the effect that a prior action mistakenly maintained under a statute or in a forum which has no jurisdiction to entertain it cannot, whether successful or unsuccessful, bar a subsequent properly maintained federal cause of action.

Court specifically declined to pass upon the continued viability of the *Troxell* holding as applied to the precise party situation which existed in both *Troxell* and this case. At 270 U.S. 622-623, this Court held:

> *"Whether, . . . we now should hold that where, as in the Troxell Case, the rights of additional beneficiaries, not actual parties to the first judgment, are involved, the requirement of identity of parties is unsatisfied,* is a question we do not feel called upon here to re-examine; since we are clear that such requirement is fully met in the situation now under consideration, where the sole beneficiary was an actual party to the proceeding under the state law, and present by her statutory representatives in the action under the Federal law, and no other rights were involved." (Emphasis suppied.)

Thus, the *Troxell* holding remained entirely unaffected by *Schendel.*

The railroad argues that *Troxell* does not apply because the "parties" in the Florida wrongful death action and those in the F.E.L.A. case are really the same. It is enough to say that the District Court of Appeal has determined, as a matter of state law by which this Court is, of course, bound, e.g., *American Railway Express Co.* v. *Kentucky,* 273 U.S. 269 (1926), that there is "a substantive distinction" as to the parties in the two cases. Under Florida law, the widow would have kept all the money recovered. In the case of the F.E.L.A. action, each of Hodge's children has

an independent, protectable right to the money allocated by the jury for his damages.[13]

Since the railroad has not, until now, even suggested that the judgment against it can be divided into widow's and children's portions, and since the applicable federal and state law is that recovery by the estate for the widow and children of the decedent cannot be precluded by a prior action brought by the widow individually in which the children were not at all parties, it follows that on this narrow ground alone, the District Court decision cannot be successfully challenged.

2. There is a second, perhaps even more persuasive reason, or set of reasons, why "collateral estoppel" could not have been applied here. Collateral estoppel applies to bar re-litigation, as between the same parties, of the *same or "identical"* factual issues already litigated in a different cause of action. E.g., *United States* v. *International Building Co.*, 345 U.S. 502 (1953); cf., *Ashe* v. *Swenson*, 397 U.S. 436, 443-444 (1954); *Gordon* v. *Gordon*, supra. It goes virtually without saying that the issues in the first were not only not identical but were completely disparate:

(a) First, the Safety Appliance Act claim was not litigated at all in the first case; and there was thus no factual finding as to the railroad's violation of the Act whatever. Indeed, in the trial court, the railroad, recognizing this circumstance, did not even raise the claim of "collateral estoppel" as a defense to the estate's Safety Appliance Act claim in Count

13. The petitioner's appellate contentions that the District Court conclusion is wrong as a matter of substantive Florida law would have been better addressed, as has been suggested, to the Florida Supreme Court in a petition for "direct conflict" certiorari.

II of its complaint. Since the entire verdict and judgment was admittedly based upon the railroad's S.A.A. violation alone, it is apparent that the collateral estoppel can have not the remotest effect upon the result in this case.

(b) Even as to the negligence claim, the isssues were entirely non-identical. As we have noted, the "issue" determined by the first jury was only that the railroad was not guilty of any substantive negligence under the Florida common law which was a proximate cause of Hodge's death. As we have noted, and as the Supreme Court of Florida itself has expressly recognized, the common law of Florida and the federal law applicable under the F.E.L.A. are widely different (and vastly more favorable to the plaintiff) even as to the basic rules concerning the existence of negligence required and its causal relationship to an employee's injury or death. E.g., *Atlantic Coast Line R. Co.* v. *Barrett*, Fla. 1958, 101 So. 2d 37; *McCalley* v. *Seaboard Coast Line R. Co.*, Fla. 1972, 265 So. 2d 11. And we have already noted that the plaintiff could not even allege or prove vital types of negligent conduct under Florida law. Thus, the railroad could not show that the issues properly presented even in the F.E.L.A. negligence case had in fact been resolved in its favor in the prior action.[14]

---

14. For another closely related reason which has already been indicated, the separate defense of res judicata, even if properly before either the District Court of Appeal or this one, would not be applicable. Under the *Troxell*, *Schendel* and *Phillips* cases, supra, a prior determination under state law of no employer liability cannot preclude, on res judicata principles, a subsequent federal action if the state law remedy is markedly less favorable to the employee than the federal one. As we have noted, supra, that is precisely the case in this situation in which, in many important respects, the common law rules of liability causation and applicable defenses (specifically to a Safety Appliance Act claim) are far less "liberal" than those under the F.E.L.A.

3. For still a third reason, neither the defense of collateral estoppel—nor that of res judicata—could be applicable. In this proceeding, the respondent does not challenge the finding that, as a matter of law, Hodge met his death in the furtherance of interstate commerce. Since this is true, it is entirely settled that the state court had no *jurisdiction* over the subject matter of the "first" case maintained under the Florida wrongful death act; in the case of a railroad employee injured or killed in the course of his employment, the F.E.L.A. provides the exclusive jurisdictional means in which an injury or wrongful death action may be pursued. E.g., *Mondou* v. *New York, N.H. & H. R. Co.*, supra; *New York Central R. Co.* v. *Winfield*, supra. It is apodictic, therefore, that the earlier judgment of the state court, entered absent jurisdiction over the subject matter of the proceeding cannot have either collateral estoppel or res judicata effect upon any subsequent judgment. Restatement, Judgments, § 1.

The petitioner argues, however, that, although the issue was never raised, controverted or litigated in any way in the first case, the "effect" of the judgment entered there amounted to a determination that Hodge was not an F.E.L.A. employee at the time of his death which precludes a "re-litigation" of that issue. The authorities are unanimously contrary to this proposition. The cases interpreting both the F.E.L.A. and the identical Jones Act, 45 U.S.C., § 688, have unanimously held that even the successful commencement of a proceeding—such as a workmen's compensation action—which is necessarily factually inconsistent with a later claim that the F.E.L.A. or the Jones Act is exclusively applicable, does not amount to a binding

"election," res judicata or collateral estoppel as to a subsequent action, like this one, *under* the F.E.L.A. or the Jones Act, so long as there has been no specific litigation and adjudication on the jurisdictional issue in the prior case. Contrast, *Chicago, R.I. & P.R. Co.* v. *Schendel,* supra, in which the widow suffered a specific, and therefore binding, adverse adjudication as to the applicability of the state workmen's compensation statute to her husband's death.

Thus, in the F.E.L.A. case of *Pritt* v. *West Virginia N. R. Co.,* 132 W. Va. 184, 51 S.E. 2d 105, 115-118, cert. den., 336 U.S. 961 (1943), the plaintiff had successfully litigated, even through appeal, his right to recover state workmen's compensation benefits. Although these benefits could be awarded only if he were as a matter of fact not employed in interstate commerce at the time of his injury, the Court held that his prior action did not bar a subsequent suit under the F.E.L.A., which required a determination that he *was* engaged in interstate commerce. The basis for this ruling was the fact that there had been no prior *adjudication* or admission concerning the plaintiff's employment in the compensation proceeding. Accord, e.g., *Waters* v. *Guile,* 6 Cir. 1916, 234 F. 532, 536; *Maxwell* v. *Kurn,* Mo. App. 1944, 180 S.W. 2d 249, reversed on other grounds, Mo. 1944, 185 S.W. 2d 9; *Hogan* v. *New York C. & H.R. Co.,* 2 Cir. 1915, 223 F. 890; *Schumacker* v. *Industrial Accident Commission,* 46 Cal. App. 295, 115 P. 2d 571, 574-575 (prior successful F.E.L.A. action does not estop subsequent compensation proceeding); *Bretsky* v. *Lehigh Valley R. Co.,* 2 Cir. 1946, 156 F. 2d 594; *Boatel, Inc.* v. *Delamore,* 5 Cir. 1967, 379 F. 2d 850, 855 (prior successful maintenance of state compensation action

does not preclude later jurisdictionally inconsistent Jones Act proceeding in absence of showing of "real contest" over jurisdictional issue or that it had "really been litigated" in the compensation proceeding); *Mike Hooks, Inc.* v. *Pena*, 5 Cir. 1963, 313 F. 2d 696 (same); *Wilkes* v. *Mississippi River Sand & Gravel Co.*, 6 Cir. 1953, 202 F. 2d 383 (same); *Gahagen Construction Corp.* v. *Armao*, 1 Cir. 1948, 165 F. 2d 301. That rule, which means simply that a party's—or really an attorney's—mistake in bringing an action which is jurisdictionally incorrect as a matter of law, cannot serve to deprive one of an available federal statutory remedy, is directly applicable here.[15]

## REASONS FOR DENYING PETITION

The petition for writ of certiorari should not be granted because:

1. The decision sought to be reviewed is not shown to have been that of the "highest state court in which a decision could be had", under 28 U.S.C., § 1257.

---

15. Contrary to the suggestion of the petitioner, there is no suggestion that the successive suits were maintained for any reason other than that Mrs. Hodge's original counsel had (along with the railroad) made a mistake as to the remedy jurisdictionally available to recover for Mr. Hodge's wrongful death. Moreover, although the relevance of the contention is not clear, the petitioner is wrong in suggesting that, under Florida Rule of Civil Procedure 1.110(g), alternative claims under the state law and the F.E.L.A. could have been maintained in one action. Under the rule, only a single "party" may join alternative causes of action. The Florida law is clear that a person acting in her individual capacity, such as Mrs. Hodge in the Florida wrongful death action, and one acting in a representative capacity, that is for Mr. Hodge's estate as required by the F.E.L.A., are not the same "party," but different ones who may not join in a single case. E.g., *General Dynamics Corp.* v. *Hewitt*, Fla. App. 1969, 225 So. 2d 561; *Fidelity-Philadelphia Trust Co.* v. *Ball*, Fla. App. 1968, 208 So. 2d 282.

2. The decision below involves a concurrence of factual and procedural factors—including a distinction as to the "parties" involved in the state law and F.E.L.A. actions, the failure of both parties to recognize the jurisdictional inapplicability of the state law proceeding, and the specific appellate waiver of the claim of "res judicata"—which render the decision below virtually unique, of little precedental effect and of no substantial interest or importance to anyone other than its particular parties.

3. The result reached in the decision sought to be reviewed is fully in accordance, on several alternative grounds, with prior determinations of this Court and of other federal courts concerning the issues presented.

## CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT J. BECKHAM
1010 Concord Building
Miami, Florida 33130
*Attorney for Respondent*

Of Counsel:
HORTON, SCHWARTZ & PERSE
and
BECKHAM & MCALILEY
Miami, Florida 33130

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Respondent was mailed to Petitioner herein by placing same in the United States mail, properly addressed, postage prepaid, on this the 29th day of September, 1972, to the attorneys named below:

ADAM G. ADAMS, II
1116 Barnett Bank Building
Jacksonville, Florida 32202

DENNIS G. LYONS
DAVID BONDERMAN
1229 Nineteenth Street, N.W.
Washington, D. C.

.....
*Attorney for Respondent*